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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5384

DAVID SANDSTROM,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

BRIEF FOR PETITIONER

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OPINIONS BELOW

The Supreme Court of Montana has issued an opinion in this case, a copy of which appears in the Appendix, page 45. The opinion is officailly reported at 35 St.Rptr. 744, 580 P.2d 106. The Judgment of the Supreme Court of Montana is printed in the Appendix, page 52. An order denying rehearing is also included in the Appendix, page 54. The Journal Entry of the Judgment of the Supreme Court of Montana, is printed in the Appendix, page 2.

JURISDICTION

The Judgment of the Supreme Court of Montana was entered on June 29, 1978 [Appendix, page 52]. The timely petition for rehearing was denied on June 28, 1978 [Appendix, page 54]. The jurisdiction of the Supreme Court is invoked pursuant to this Court's ability to review and decide any title, right, privilege or immunity specially set up or claimed under the Constitution of the United States. 28 U.S.C. §1257(3). Petition for Writ of Certiorari to the Montana Supreme Court was filed September 12, 1978; Certiorari granted January 8, 1978.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)

This case also involves Sections 94-5-101, 94-5-102(a), 94-2-101(27) and (52), 93-1301-1, 93-1301-2, 93-1301-3, 93-1301-4, 93-1301-5, and 93-1301-7(3), of the Revised

Codes of the State of Montana, which provide as follows:

Section 94-5-101. CRIMINAL HOMICIDE.

> "(1) A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being.
>
> (2) Criminal homicide is deliberate homicide, mitigated deliberate homicide, or negligent homicide."

Section 94-5-102(a). DELIBERATE HOMICIDE.

> "(1) Except as provided in 94-5-103(1)(a) criminal homicide constitutes deliberate homicide if:
>
> (a) it is committed purposely or knowingly; . . ."

Section 94-2-101(27)

> ""Knowingly"—a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning."

Section 94-2-101(52)

> ""Purposely"—a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although

such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning."

Section 93-1301-1. INDIRECT EVIDENCE CLASSIFIED.

"Indirect evidence is of two kinds:

1. Inferences; and,
2. Presumptions."

Section 93-1301-2. INFERENCE DEFINED.

"An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of the law to that effect."

Section 93-1301-3. PRESUMPTION DEFINED.

"A presumption is a deduction which the law expressly directs to be made from particular facts."

Section 93-1301-4. WHEN AN INFERENCE ARISES.

"An inference must be founded:

1. On a fact legally proved; and,
2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature . . . "

Section 93-1301-5. PRESUMPTIONS MAY BE CONTROVERTED, WHEN.

"A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumption."

Section 93-1301-7(3). ALL OTHER PRESUMPTIONS MAY BE CONTROVERTED.

"All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions; and may be controverted by other evidence. The following are of that kind:

(3) That a person intends the ordinary consequences of his voluntary act."

And the Rules 301(a) and 301(b)(2) of the Montana Rules of Evidence:

Rule 301. PRESUMPTIONS IN GENERAL.

"(a) Presumption defined. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding.

(b) CLASSIFICATION AND EFFECT OF PRESUMPTIONS

(2) All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption."

QUESTION PRESENTED

Did the Jury Instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts.," given at Petitioner's trial on the charge of Deliberate Homicide committed purposely or knowingly deprive him of his Fourteenth Amendment right to

a jury determination as to every element of the crime charged against him upon proof of guilt beyond a reasonable doubt?

STATEMENT OF THE CASE

On November 1, 1976, Mrs. Annie Jessen, eighty-nine years of age and a life-long resident of Anaconda, Montana, was found dead in her home. She was the victim of an assault involving a blow to her head by a shovel and five stab wounds in her back from a kitchen knife. Mrs. Jessen had also been sexually assaulted, apparently after her death.

On or about November 22, 1976, Petitioner, David Sandstrom, eighteen years of age, and also of Anaconda, was arrested with regard to an unrelated burglary. Shortly thereafter, while in custody of the Deer Lodge County Sheriff, Petitioner confessed to causing the death of Mrs. Jessen. This confession was later collaborated by various circumstantial facts; notably, the identification of a pubic hair found on Mrs. Jessen as being probably that of Petitioner's; and by Petitioner leading Deer Lodge County law enforcement officers to Warm Springs Creek in Anaconda where he had thrown the knife. Based upon the confession and collaborating evidence, Petitioner was charged on December 2, 1976, with Deliberate Homicide in that he, "purposely or knowingly caused the death of Annie Jessen." [Information, Appendix page 3].

At his arraignment on this charge, Petitioner entered a plea of not guilty and simultaneously filed a notice of intent to rely on a mental disease or defect excluding

responsibility for the alleged crime. [Appendix page 4]. Pursuant to such notice, Petitioner was examined by two court-appointed mental health experts, Dr. William Stratford, a psychiatrist practicing in Missoula, Montana, and Dr. Michael Nash, a clinical psychologist practicing in Bozeman, Montana. The independently prepared reports of both doctors were in agreement as to their evaluation of Petitioner's mental condition at the time of the death of Mrs. Jessen. Both men found that Petitioner did not suffer from a mental disease or defect which under the Montana Criminal Code would relieve him of responsibility for his acts. Both men did find, however, that Petitioner, a person of borderline retarded intelligence, suffered from a personality disorder marked by impulsiveness, aggressiveness, and a lack of planning. Additionally, the doctors stated that the characteristics of Petitioner's personality disorder, impulsiveness and aggressiveness, would be aggravated to a serious degree by alcohol consumption. [Appendix pp. 12-15, 22-26]. On the night the Petitioner caused the death of Mrs. Jessen, evidence shows that he had consumed between three and four six-packs of beer and some whiskey. [Appendix p. 9-10]. The doctors formed the opinion, after considering the combination of Petitioner's personality, the evidence of intoxication, and the circumstances surrounding the fatal acts as stated in Petitioner's confession, that Petitioner did not intend the death of Mrs. Jessen. [Appendix pp. 16, 17, 21, 22, 26, 27, 33]. Based on the expert opinions of Drs. Stratford and Nash, Petitioner's attorney informed the jury in his opening remarks that he no longer intended to rely on a mental disease or defect excluding responsibility, but rather, intended to contest the allegation that Petitioner

acted purposely or knowingly in taking Mrs. Jessen's life. [Appendix pp. 6-8].

Petitioner's trial commenced July 18, 1977. The Prosecution case consisted of the confession together with collaborating evidence. The defense case consisted of the testimony of Drs. Stratford and Nash which was to the effect that the Petitioner did not have either "purpose" or "knowledge", required by Montana law as an element of the offense of Deliberate Homicide, in causing Mrs. Jessen's death. The jury found the Petitioner guilty of Deliberate Homicide and he was sentenced to one hundred years confinement in the Montana State Prison. [Appendix pp. 38, 39, 42].

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Following presentation of all the evidence, the Court included in its instructions to the jury the instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts." [Appendix p. 35]. This instruction, requested by the Prosecution, was objected to by Petitioner's attorney as violating the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States by shifting the burden of proof to the Petitioner on the issue of intent. The trial Court, however, overruled the objection. [Appendix p. 34].

The verdict and judgment of the Trial Court was timely appealed to the Supreme Court of Montana. A principle question raised in that appeal concerned the Constitutionality of Jury Instruction No. 5. [Appendix p. 49-51]. The Supreme Court of Montana affirmed the Trial Court's verdict and judgment in a decision dated

June 8, 1978. In that decision, the Court stated that the instruction was not violative of due process standards. [Appendix pp. 49-51].

A timely petition for rehearing, again questioning the Constitutionality of Jury Instruction No. 5, was denied June 28, 1978. [Appendix p. 54].

On September 12, 1978, the Petition for Writ of Certiorari was filed in this Court. On January 8, 1979, the Writ of Certiorari to the Supreme Court of Montana was granted [Appendix p. 55].

SUMMARY OF ARGUMENT

Petitioner was charged and convicted of Deliberate Homicide committed purposely or knowingly under Section 94-5-102(a) of the Montana Criminal Code. From the plain language of this statute and from the interpretations given it by the Montana Supreme Court, it is clear beyond question that to purposely or knowingly cause a death is an element of this crime and that these terms embody the concepts of *mens rea* and criminal intent. *State v. Collins,* ___Mont.___, 582 P.2d 1179, 1184, 35 St.Rptr. 993, 999 (1978); *State v. Klein,* ___Mont.___, 547 P.2d 75, 78, 33 St.Rptr. 283, 288 (1976); *State v. Sharbono,* ___Mont.___, 563 P.2d 61, 72, 34 St.Rptr. 196, 211 (1977). *State v. McKenzie,* ___Mont.___, 581 P.2d 1205, 1232, 35 St.Rptr. 759, 794 (1978).

The trial evidence consisted of Petitioner's confession, collaborating evidence and the testimony of two court-appointed mental health experts, a psychiatrist and a psychologist. The opinions of the mental health experts were that Petitioner neither purposely or knowingly

caused the death in undertaking the fatal acts as described in the confession. A question thus being raised as to an element of the crime charged against Petitioner he was entitled to a jury determination as to this element upon proof of guilt beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

Upon request of the Prosecution and over Defense objection, the jury was instructed that, "The law presumes a person intends the ordinary consequences of his voluntary acts." The common meaning of this instruction is that the jury should accept the fact that Petitioner intended to cause the death without proof. Under Montana law the instruction placed upon Petitioner the burden of proving that he did not intend the death by a preponderance of the evidence. Sections 93-1301 et.seq. quoted *supra.*, p. 4, 5 and Rule 301, Montana Rules of Evidence, quoted *supra.*, p. 5. Petitioner argues that this shifting of the burden of proof to him on the element of intent deprived him of his right to due process of law under the Fourteenth Amendment to the United States Constitution. Upon appeal, the Montana Supreme Court affirmed the use of this presumption against Petitioner in direct contradiction of this Court's holdings in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975); *Morrissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952); and, *Patterson v. New York*, 432 U.S. 197, 53 L.Ed.2d 281, 97 S.Ct. 2319 (1977).

ARGUMENT

I. TO PURPOSELY OR KNOWINGLY CAUSE A DEATH IS AN ELEMENT OF THE OFFENSE CHARGED AGAINST PETITIONER AND OF WHICH PETITIONER WAS CONVICTED.

Petitioner was charged under Section 94-5-102(1)(a) Montana Criminal Code, Deliberate Homicide Committed Purposely or Knowingly, [Appendix p. 3]. This Section (quoted *supra.*, p. 3) is part of the Montana Criminal Code enacted in 1973. It represents an abandonment of the old terms defining first degree murder: "premeditation" and "malice aforethought." These terms are replaced by the terms "purposely" or "knowingly," which are defined in Sections 94-2-101, (27) and (52) of the Montana Criminal Code. These definitions were given to the jury in Petitioner's trial by Instructions Nos. 7 and 8:

INSTRUCTION NO. 7:

> ""Knowingly" is defined as follows: A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstances exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning." [Appendix pp. 35, 6].

INSTRUCTION NO. 8:

> ""Purposely" is defined as follows: A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result." [Appendix p. 36]

Section 94-5-102(1)(a) Montana Criminal Code is on its face perfectly clear that purposely or knowingly causing a death is an element of this crime. Beyond this, the Montana Supreme Court has stated unambiguously that purposely or knowingly causing a death is an element of deliberate homicide charged under this section and that these terms embody the *mens rea* or criminal intent element of this crime:

> "It is to be noted from the definitions that committing the homicide 'purposely or knowingly' is an element of deliberate homicide, . . ."

State v. Collins, ___Mont.___, 582 P.2d 1179, 1184, 35 St.Rptr. 993, 999 (1978).

> "It is clear that the legislature intended the words "purposely" and "knowingly" would substitute for the word feloniously (i.e. intentionally) as used in the old code. . . ."

State v. Klein, ___Mont.___, 547 P.2d 75, 78, 33 St.Rptr. 283, 288 (1976).

> "The necessary requirements for "*Mens Rea*" and "*Criminal Intent*" are embodied in the use of the new language of the statute "purposely" and "knowingly"."

State v. Sharbono, ___Mont.___, 563 P.2d 61, 72, 34 St.Rptr. 196, 211 (1977).

> "In Montana, a person commits the offense of deliberate homicide if he purposely or knowingly causes the death of another human being. Sections 94-5-102(1)(a), 94-5-101(1), R.C.M. 1947. The statutorily defined elements of the offense, each of which the State must prove beyond a reasonable doubt, are therefore, causing the death of another human being with the knowledge that you are causing or with the purpose to cause the death of that human being."

State v. McKenzie, ___Mont.___, 581 P.2d 1205, 1232, 35 St.Rptr. 759, 794 (1978).

McKenzie was decided by the Montana Supreme Court on remand from this Court for further consideration in light of *Patterson v. New York*, 432 U.S. 197, 53 L.Ed.2d 281, 97 S.Ct. 2319 (1977); and was cited as precedent for the holding in Petitioner's appeal [Appendix p. 50]. Because purposely or knowingly causing a death is held in *McKenzie* to be an element of Deliberate Homicide, *McKenzie* does not bring Petitioner's case under the holding of *Patterson* that state legislatures may designate some factual matters which are not elements of offenses as affirmative defenses.

The jury in Petitioner's trial was instructed without objection that an element of deliberate homicide was that the Defendant caused the death of the victim purposely or knowingly, Instruction No. 3 [Appendix p. 34, 5]. The Verdict and Judgment was: Guilty of the charge Deliberate Homicide [Appendix p. 38]. From all the foregoing, the fact that purposely or knowingly causing the death was an element of the crime charged against the Petitioner and of which he was convicted is clear beyond question.

II. THE QUESTION AS TO WHETHER PETITIONER PURPOSELY OR KNOWINGLY CAUSED THE DEATH WAS PROPERLY RAISED BY THE TRIAL EVIDENCE AND PRESENTED A QUESTION FOR JURY DETERMINATION UPON PROOF BEYOND A REASONABLE DOUBT.

In his opening remarks, Petitioner's attorney informed the jury that he intended to contest the allegation that Petitioner had caused the death purposely or knowingly. [Appendix pp. 6-8]. The evidence presented by the State at Petitioner's trial consisted of Petitioner's confession, [Appendix pp. 9-11] together with evidence tending to show the validity of the confession. The evidence presented by the defense consisted of the testimony of two Court-appointed mental health experts, Dr. William Stratford, Psychiatrist practicing in Missoula, Montana, and Dr. Michael Nash, Psychologist, practicing in Bozeman, Montana. Both men were well versed in the forensic aspects of psychiatry or psychology, Dr. Stratford being a consulting psychiatrist with the Montana State Prison [Appendix p. 13], and, Dr. Nash being past chief of clinical services at the Montana State Prison and continuing as a consultant there [Appendix p. 23]. Each of these doctors had examined Petitioner and were acquainted with the facts stated in the confession. Assuming those facts to be true and based upon their examination and the circumstances of the case both men stated the opinion that the defendant did not intend to kill Mrs. Jessen. Specifically, Dr. Stratford to the question,

> "Do you think he formed the intent and purpose of taking her life?"

Answered,

> "In my opinion—he did not intend to kill her. . . ." [Appendix p. 21].

In answer to the question,

> "Do you think he was aware of that fact and he was—he knew he was taking her life?"

Dr. Stratford stated,

> "In my opinion I believe that his intent was merely to silence her I don't think he really considered it." [Appendix pp. 21, 22].

And in response to the question,

> "Would it be fair to say that this was an act, an impulsive act?"

Dr. Stratford answered,

> "Yes, in my opinion it was impulsive. As I have tried to indicate, I do not think it was his purpose to kill her. . . ."[Appendix p. 22].

Dr. Nash, in response to the question,

> "Do you have an opinion as to whether or not David Sandstrom deliberated on the death of Mrs. Jessen?"

Answered,

> "In my opinion he did not anticipate or plan the death of Mrs. Jessen." [Appendix pp. 26, 27].

And, to the question,

> "Dr. Nash in response to the cross examination question do you believe David Sandstrom had the capacity to comprehend or know what he was doing—stabbing Mrs. Jessen and as a result taking

her life. Do you have an opinion as to whether he had that knowledge in the sense of a present awareness that that is what he was doing?"

Answered,

"In my opinion at the time the killing took place he was in a—had a condition which is described as a rage, meaning that he was less conscious of awareness of the activities that were going on. This is partly a result of his intelligence, partly a result of the fact that he had some alcohol, partly the result of the fact that he had tendencies of repressive feelings of guilt that when they are provoked to, flooding out, his anger projection and at that time that the act was going on he had a less appreciation for the logical consequences of the behavior that he was engaging in than he would have ordinarily. But, this did not approach a psychotic condition so therefore he had the capacity to appreciate it. If he would have been in a psychotic condition he would have had little memory of the events but, in fact, he does remember them so psychologically the capacity was there but the likelihood or the nature of that appreciation have been somewhat reduced." [Appendix p. 33].

The opinions of both these experts were based upon their findings that Petitioner suffered from a borderline retarded intelligence and a personality disorder marked by impulsiveness and a lack of planning which would be aggravated to a significant degree by the amount of alcohol that he had consumed on the night of the fatal acts. [Appendix pp. 13-15, 24-26]. Both experts had formed the opinion that Petitioner's specific intent in undertaking the acts which caused the death of Mrs. Jessen was to stop her from screaming and that he did not have in mind causing her death. [Appendix pp. 16, 17, 27]. No attempt was made to rebut this expert testimony by the State.

Clearly the testimony of Drs. Stratford and Nash raised a question as to an element of the crime with which Petitioner was charged; that is, "Did Petitioner act purposely or knowingly in causing the death?" Such question being raised, Petitioner had the constitutional right to a jury determination of this factual question upon proof of guilt beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368, (1970).

III. THE JURY INSTRUCTION, "THE LAW PRESUMES THAT A PERSON INTENDS THE ORDINARY CONSEQUENCES OF HIS VOLUNTARY ACTS," SHIFTED THE BURDEN OF PROOF OF THE ELEMENT OF PURPOSELY OR KNOWINGLY CAUSING THE DEATH TO PETITIONER AND THEREBY DENIED HIM HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

At the time of settlement of Jury Instructions, Petitioner's attorney objected to Proposed Instruction No. 5: "The law presumes that a person intends the ordinary consequences of his voluntary acts.", upon the grounds that this instruction shifted the burden of proof on the element of intent to the defense in violation of Due Process Clause of the Fourteenth Amendment. This objection was overruled by the trial Court and the Instruction was given. [Appendix p. 34]. No instructions were given to the jury defining the classification, nature or effects of presumptions in criminal proceedings.

Under the common meaning of the word "presume," the instruction directed the jury to believe the fact presumed without proof. Webster's New Collegiate Dictionary (1977 ed.), "Presume," def. No. 3 p. 911. The word, "intent," means "purpose." Webster's New Collegiate Dictionary (1977 ed.): "Intent," def. No. 1 (a) p. 601. In other words, Jury Instruction No. 5 misled the jury to take for granted that the Petitioner had the requisite intent or purpose to kill if his act was proven as causing Mrs. Jessen's death. The effect of Jury Instruction No. 5 was to direct the jury to accept, without question, the existence of purpose in Petitioner's act. This deprived Petitioner of his due process right to have a jury determination as to every element of the charge against him upon proof of guilt beyond a reasonable doubt.

Even if it is assumed for argument that the jury understood the meaning of the word, "presume," as that term is used in Montana law, the Petitioner would still be deprived of his right to have a jury determination of the proof of every element of the charge against him beyond a reasonable doubt. A presumption under Montana law is, "[A] deduction which the law expressly directs to be made from particular facts." Sec. 93-1301-3 R.C.M. 1947; quoted *supra.* p. 4; or as otherwise stated, "[A]n assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding." Montana Rules of Evidence Rule 301(a). The particular presumption here at issue is statutorily stated to be a disputable presumption. Section 93-1301-7(3) R.C.M. 1947, quoted *supra.*, p. 5. With respect to disputable presumptions,

Rule 301(b)(2) of the Montana Rules of Evidence states:

> "All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. A disputable presumption may be overcome by a preponderance of the evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption."

This rule codifies earlier Montana case law. *Monahan v. Standard Motor Company*, 96 Mont. 165, 173-74, 29 P.2d 278 (1934). See also, Sec. 93-1301-5 R.C.M. 1947, quoted *supra.*, p. 4. It is clear from these authorities that under Montana law Instruction No. 5 shifted the burden of proof on the element of purpose or knowledge, *i.e.*, intent, to the Petitioner to prove by a preponderance of the evidence that he did not intend to kill.

The statement made by the Montana Supreme Court in its opinion on Petitioner's appeal that,

> "Defendant's sole burden under Instruction No. 5 was to produce some evidence that he did not intend the ordinary consequences of his voluntary acts not to disprove that he acted purposely or knowingly.," [Appendix p. 50].

is without foundation in statute or rule, and ignores the plain meaning of this instruction. Further, this statement is not meaningful in terms of the facts of the case: As characterized by the Court itself, the testimony of Drs. Stratford and Nash was that Defendant may not have had the specific intent to kill at the time of the offense [Appendix p. 47]. This was certainly "some evidence," that Petitioner did not intend the ordinary consequences of his voluntary acts. If this was Petitioner's sole burden under the presumption, he would have met it and there

would be no reason to state the presumption to the jury. Further, no instruction was given to the jury explaining to them that Instruction No. 5 required only the production of "some evidence." The opinion of the Montana Supreme Court ignores the clear effect of Instruction No. 5 on the jury both under its common meaning and its meaning under Montana law.

At least four Federal Circuit Courts of Appeal have disapproved instructions embodying the concept expressed in Instruction No. 5. The history of this instruction in the Fifth Circuit can be traced to *Mann v. United States*, 319 F.2d 404 (5th Cir., 1963) *cert. denied*, 375 U.S. 986, 84 S.Ct. 520, 11 L.Ed.2d 474 (1964) (Although, the *Mann* holding certainly does not represent the first time this question was dealt with. In fact, The Montana Supreme Court, itself, as early as 1898, found an instruction of similar effect to be reversible error, *State v. Judd*, 20 Mont. 420; see also, *State v. Schafer*, 35 Mont. 217, 88 Pac. 792 (1920); and, *State v. Garney*, 122 Mont. 491, 207 P.2d 506 (1949).) In the *Mann* case the Fifth Circuit Court of Appeals disapproved of an instruction which shifted the burden of proof on the element of intent to the Defendant, stating,

> "If an inference ... must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption." p. 1246

Since *Mann*, cases too numerous to cite challenging the instruction have been brought in the Fifth Circuit. For economy reference may be made to the concise history of these cases as presented by Judge Clark, writing for the

Circuit sitting en banc, in *United States v. Chiantese*, 560 F.2d 1244, 1245-1255 (1977). This state of affairs caused the Fifth Circuit, to direct that:

> "No district Court in this Circuit shall include in its charge to the jury an instruction on proof of intent which in couched in language which could reasonably be interpreted as shifting the burden to the accused to produce proof of innocence." *United States v. Chiantese*, supra., p. 1255.

Similarly, the Third Circuit recently banned the use of this type of Instruction in *United States v. Garrett*, 574 F.2d 778, (3rd Cir. 1978) Cert. denied ___ U.S. ___, ___ S.Ct. 56 L.Ed.2d 67 (1978); wherein the Court stated,

> "Hereafter District Courts in this Circuit shall not use language in instructions that reasonably can be interpreted as shifting the burden to the accused to produce proof of innocence. This includes charges indicating that the law presumes a person to intend the natural and probable consequences of his knowing acts, as well as charges substantially similar to that given in this case." p. 782

The Second Circuit strongly disapproved the instruction in *United States v. Bertolotti*, 529 F.2d 149, 159 (2nd Cir. 1975.) and *United States v. Barash*, 365 F.2d 395 (2d Cir. 1966). The Ninth Circuit, has also disapproved of intent-presumption instructions. See, *Block v. United States*, 221 F.2d 786, 788-89 (9th Cir. 1955); and, *Chappell v. United States*, 270 F.2d 274, 279, 280 (9th Cir. 1959).

The rationale of all these Federal Circuit Courts of Appeal cases clearly shows that rather than requiring Petitioner to merely produce some evidence that he did

not intend to kill, Instruction No. 5, at the least, shifted to him the burden of proving by a preponderance of the evidence that he did not purposely or knowingly cause a death and more probably allowed the jury to assume intent to kill without proof.

This Court has held that the Due Process Clause requires of the States that in criminal prosecutions they prove every ingredient of an offense beyond a reasonable doubt and that they may not shift the burden of proof to the Defendant by presuming that ingredient upon proof of other elements of the offense. *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975); *Morrissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), and *Patterson v. New York*, 432 U.S. 197, 53 L.Ed.2d 281, 295, 97 S.Ct. 2319 (1977). Instruction No. 5 instructed the jury in Petitioner's trial to presume the element of purposely or knowingly causing the death, *i.e.* intent to kill, which was the very crux of the case, from the element of causing the death; this instruction thereby deprived Petitioner of his right to due process of law under the Fourteenth Amendment to the United States Constitution.

CONCLUSION AND PRAYER FOR RELIEF

Petitioner was charged and convicted of Deliberate Homicide committed purposely or knowingly. The element of this crime, that Petitioner purposely or knowingly caused a death was contested by the defense and presented a question for jury determination. Due process of law requires that every element of the crime charged be proved beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 368 (1970). Petitioner's jury was, however, instructed that, "The law presumes a person intends the ordinary consequences of his voluntary acts." This instruction shifted the burden of proof to Petitioner as to the intent element of the crime charged in violation of this Court's holdings in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975) and *Patterson v. New York*, 432 U.S. 197, 53 L.Ed.2d 281, 97 S.Ct. 2319 (1977).

The question presented by this case is the same as that presented in *Morrissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952) wherein Justice Jackson analyzed the case as being presented on the theory that even if criminal intent were essential its presence should be decided by the Court as a presumption of law, apparently conclusive. And wherein, the Court held that where intent of the accused is an ingredient of the crime charged its existence is a question of fact which must be submitted to the jury, and that the Trial Court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act.

To maintain the integrity of the right to trial by jury, it is essential that the jury and not the Court make the determination as to what inferences are reasonable to be drawn from the particular facts of the case, as those facts can be determined from the evidence, and what inferences shall not be drawn. The proper role of the Court is but to instruct the jury on the standard of proof applicable.

Surely the time has come to put and end to the use of an instruction which deprives defendants of their Constitutional right to due process of the law with regard to a right so essential to criminal justice as the standard of proof of guilt beyond a reasonable doubt. And, that this instruction be ruled finally and conclusively to be reversible error no longer acceptable in the Courts of the Nation.

WHEREFORE, Petitioner prays that his conviction of the crime, Deliberate Homicide committed purposely or knowingly, be reversed.

Respectfully submitted,

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